No. 96-1187

Supreme Court, U.S.
FILED
APR 30 1997
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

AMERICAN PUBLIC GAS ASSOCIATION AND
CITIZENS GAS & COKE UTILITY,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY OF PETITIONERS AMERICAN PUBLIC GAS ASSOCIATION AND CITIZENS GAS & COKE UTILITY

HARRY V. HUFFMAN
General Counsel
Citizens Gas & Coke Utility
2020 Meridian Street
Indianapolis, Indiana 46202

STEVEN M. SHERMAN
Counsel of Record
135 North Pennsylvania Street
Suite 800
Indianapolis, Indiana 46204
(317) 231-6824

JOHN F. PRITCHARD
MARY ANN WALKER
NEIL L. LEVY
DAVID A. CRICHLOW
WINTHROP, STIMSON, PUTNAM
& ROBERTS
1133 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 775-9816

Attorneys for Petitioner
Citizens Gas & Coke Utility

(Additional Counsel Listed on Inside Cover)

WILLIAM T. MILLER
JOHN P. GREGG
MILLER, BALIS & O'NEIL, P.C.
1140 19th Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 296-2960

Attorneys for Petitioner
American Public Gas Association

TABLE OF AUTHORITIES

CASES CITED:	Page
Dunn v. Commodity Futures Trading Comm'n, ____ U.S. ____, 117 S. Ct. 913, 137 L. Ed. 2d 93 (1997)	2, 4
Federal Power Comm'n v. Louisiana Power & Light Co., 406 U.S. 621 (1972)	3
Federal Power Comm'n v. East Ohio Gas Co., 330 U.S. 464 (1950)	3
Federal Power Comm'n v. Transcontinental Gas Pipe Line Corp., 365 U.S. 1 (1961)	3
General Motors Corp. v. Tracy, ____ U.S. ____, 117 S. Ct. 811, 136 L. Ed. 2d 761 (1997)	*passim*
STATUTES CITED:	
15 U.S.C. § 717a (1994)	*passim*
15 U.S.C. § 717(c) (1994)	3
OTHER AUTHORITY CITED:	
H.R. Rep. No. 709, 75th Cong. 1st Sess. (1937)	2

No. 96-1187

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

AMERICAN PUBLIC GAS ASSOCIATION AND
CITIZENS GAS & COKE UTILITY,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY OF PETITIONERS AMERICAN PUBLIC GAS ASSOCIATION AND CITIZENS GAS & COKE UTILITY

PRELIMINARY STATEMENT

In opposing American Public Gas Association's and Citizens Gas & Coke Utility's (collectively "APGA") petition for a writ of certiorari ("Petition"), FERC merely restates the lower court's holding that FERC has jurisdiction over municipal LDCs' capacity release, "given the involvement of interstate gas pipelines," without offering any analysis or interpretation of Section 2 of the Natural Gas Act ("NGA"), 15 U.S.C. § 717a (1994), which excludes municipal LDCs from FERC's jurisdiction. *See* Br. in Opposition at 17-20. In fact, FERC in large part ignores the "plain language" argument advanced by APGA in its Petition, and thus provides no justifiable basis for denying APGA's Petition.

Since the filing of APGA's Petition, this Court issued a decision recognizing the limitations of FERC's jurisdiction under the express terms of the NGA. *General Motors Corp. v. Tracy*, _____U.S. _____, 117 S. Ct. 811, 136 L. Ed. 2d 761 (1997). This Court stated, as did APGA in its Petition, that the statutory scheme of the NGA was one of cooperative action between federal and local agencies. *Id.* at 821. *See* APGA Pet.

at 10 ("Congress struck the balance between the appropriate realm of federal regulation and the appropriate realm of local regulation and reflected it in the express terms of the NGA."). The *General Motors* decision supports the need for this Court to grant APGA's Petition in order to establish firmly the limits of FERC's authority under the NGA, in accord with Congress' express intent. For the reasons set forth by this Court in *General Motors* and those set forth below, APGA's Petition should be granted.

ARGUMENT

FERC's primary assertion in its opposition is that the Commission's jurisdiction over interstate transportation is not limited to natural-gas companies or "persons" engaged in transportation. Br. in Opposition at 17. That assertion is belied by the express language of the NGA and the legislative framework surrounding it. *See* 15 U.S.C. § 717; *see also* H.R. Rep. No. 709, 75th Cong. 1st Sess. (1937). FERC's suggested interpretation of the NGA, if accepted, would always ratify the exercise of federal authority over municipal LDCs. Such a result contravenes the NGA's exclusion of municipalities under the NGA, and is clearly at odds with Congress' express intent and this Court's recent jurisprudence interpreting the NGA and other Congressional acts. *General Motors,* 117 S. Ct. at 821; *see also Dunn v. Commodity Futures Trading Comm'n,* _____ U.S. _____, 117 S. Ct. 913, 137 L. Ed. 2d 93 (1997).

Moreover, FERC's interpretation of the NGA is not relevant in light of the express language of Section 2. This Court has recently affirmed that an agency's interpretation of a statute which it administers need not be accorded any deference where the language of the statute is clear on its face. *Dunn,* 117 S. Ct. at 920 n.14 (when a statute as a whole "clearly expresses Congress' intention . . . administrative deference is improper."). FERC's obligation is to apply the NGA as Congress wrote it. *Id.* at 916. It failed to do so.

FERC attempts to support its opposition with cases that do not support its main premise and that have no relevance to APGA's exemption claim under NGA Section 2. Instead, the cases upon which FERC relies refer only vaguely, and even then only in some of its cited cases, to the exclusionary provisions of the NGA; no citation supports FERC's position that it can

regulate municipalities under NGA Section 2. The Commission's frail arguments lean on cases involving regulation of high pressure natural gas pipelines, previous dedication of natural gas to interstate commerce and the obligation to serve, and areas in which the Commission alleged that the states were unable to manage effectively.

This is a case involving municipalities' rights to select their own customers, a responsibility they have demonstrated they are capable of performing; it does not entail the dedication of natural gas in interstate commerce, nor does it involve the interpretation of jurisdiction of high pressure gas lines. The critical issue here is whether Congress intended federal authority to govern. *Federal Power Comm'n v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 27 (1961). Petitioners submit the answer is no, and FERC's attempts to rationalize its conduct by reference to unrelated cases does not change the fact that Congress did not intend FERC to regulate municipalities under Section 2 of the NGA.

Thus, despite FERC's assertions to the contrary, the cited cases where FERC's jurisdiction is upheld *are not* "strikingly similar" to the exercise of jurisdiction over a municipal LDC's capacity release. Br. in Opposition at 18. In fact, in the cases cited by FERC, the Court approved federal regulation *only* after determining that a federal authority was attempting to control a problem that was not, by its very nature, one with which local regulatory authorities could have been expected to deal. *See, e.g., Federal Power Comm'n v. Louisiana Power & Light Co.*, 406 U.S. 621, 641 (1972). As APGA demonstrated in its Petition, that is not the case here. *See generally* APGA Pet. at 9-10.

The *General Motors* case suggests that the cases relied upon by FERC are no longer good law. *See, e.g., General Motors,* 117 S. Ct. at 821. In *General Motors,* the Court recognized the diminished application of cases like *Federal Power Comm'n v. East Ohio Gas Co.,* 330 U.S. 464 (1950)—which had permitted FERC to regulate intrastate activities of LDCs—since Congress subsequently amended the NGA with the Hinshaw Amendment. *See* 15 U.S.C. § 717(c). Nonetheless, FERC leads its opposition to APGA's Petition with the *East Ohio* case. Br. in Opposition at 18.

Surprisingly, in its opposition FERC concedes that its so-called "plenary" transportation jurisdiction does *not* extend to transactions "which Congress has made *explicitly* subject to regulation by the States." Br. in Opposition at 10 (citation omitted) (emphasis supplied). If the Court extends that assertion to its logical conclusion, it must find that any "plenary" jurisdiction that FERC may have under the NGA would *not* extend to entities which Congress *explicitly* exempted.

FERC urges this Court to let the Court of Appeals' decision stand without review—a decision that effectively and unconstitutionally rewrites Congress' express statutory language. This should not be permitted. *Dunn*, 117 S. Ct. at 916.

FERC's exercise of authority over municipal LDCs in contravention of the express exemption in the NGA presents an important constitutional issue for the Court's consideration. Both FERC's actions and the Court of Appeals' ruling negate the express language of a properly enacted federal statute. This Court must ensure both the proper administration of the NGA and the proper review of federal statutes whose language is clear and unambiguous on its face. Here Congress has spoken clearly. The Court of Appeals' decision ignoring the plain meaning of NGA Section 2 is wrong and should be reversed.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

HARRY V. HUFFMAN
General Counsel
Citizens Gas & Coke Utility
2020 Meridian Street
Indianapolis, Indiana 46202

STEVEN M. SHERMAN
Counsel of Record
135 North Pennsylvania Street
Suite 800
Indianapolis, Indiana 46204
(317) 231-6824

JOHN F. PRITCHARD
MARY ANN WALKER
NEIL L. LEVY
DAVID A. CRICHLOW
WINTHROP, STIMSON,
PUTNAM & ROBERTS
1133 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 775-9816

Attorneys for Petitioner
Citizens Gas & Coke Utility

WILLIAM T. MILLER
JOHN P. GREGG
MILLER, BALIS & O'NEIL, P.C.
1140 19th Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 296-2960

Attorneys for American
Public Gas Association

Dated: April 30, 1997